franchising authorities to initiate proceedings to show that actual costs warrant a rate higher/lower than the benchmark.

3. Benchmark Alternatives

a. Rates Charged by Systems Facing Effective Competition

The NPRM suggests as one potential benchmark "using the average of rates currently charged by systems facing effective competition,...."59/ The Coalition's preliminary view of this suggestion is that while it has a nice ring to it, since the purpose of regulation is to do indirectly what the marketplace does directly, it will not work. It will not work because there appear to be inadequate representative areas where such effective competition exists, especially in view of the number of different classes that need to be established for benchmarking to have any ostensible validity.60/ Thus, the rates resulting from effective competition in a large metropolitan area in New England may well not be representative of reasonable rates in a large metropolitan area in the midwest, much less small towns in the South, etc, etc.

59/ NPRM, p. 26.

60/ See NPRM, pp. 87-88 (Schedule B): "the Cable Act of 1992 found that cable operators face no effective competition in the majority of markets."

Information on competitive rates where there is effective competition may, however, be useful to the FCC and to franchising authorities in carrying out their functions under the 1992 Act, and therefore the Coalition would urge the FCC to collect such data that appears to be the purpose of Schedule 4 of the Commission's December 2, 1992 Order on this docket.

b. Past Regulated Rates

The NPRM suggests as a second alternative developing "a benchmark for basic service tier rates based on rates charged in 1986 before the Cable Communications Policy Act of 1984 effectively prohibited local rate regulation of most cable systems."61/ The Coalition does not believe that relying on stale data, resulting from a time when far fewer cable systems existed and the state of the art was substantially different, is a responsible way to proceed. What is needed is information on current costs; relying on rates that are at least 6 years old as a proxy will not pass regulatory muster.

61/ NPRM, p. 28.

c. Average Rates of Cable Systems

The third alternative suggested in the NPRM is to "use data for all cable systems operating in 1992 to develop a benchmark from the average per channel rate for their lowest service tier."62/ This is unacceptable because it appears to be premised on the notion that existing rates, when averaged, bear some semblance to reasonable rates, when the Cable Act was passed because existing rates are not reasonable.63/ The FCC must distinguish between current costs (which are relevant in determining reasonable rates) and current rates (which are unreasonable because they reflect monopoly rents). Replacing existing rates with some average of existing rates is a circular exercise which will frustrate, not further, the purposes of the Cable Act.

d. Cost-of-Service Benchmark

The next alternative suggested in the NPRM is to use cost data gathered in this rulemaking to construct costs of an "ideal" or "typical" cable system or systems; the NPRM suggests that such data could be used to establish a single national benchmark for all cable systems, several benchmarks reflecting significant characteristics of cable systems, or

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62/ NPRM, pp. 28-29.

63/ See, e.g., House Report pp. 30-34; see also NPRM, p. 88 (Schedule B).

a formula for calculating benchmarks, including cost differences across different geographic areas.64/

A single benchmark is unacceptable for all of the reasons noted above as to why, if the benchmark is adopted, it must distinguish between cable systems based on important variables.65/ Whether a formula approach can be developed that accurately tracks the cost of doing business is problematic. The NPRM's own very modest goal of producing a benchmark "roughly related to cost without requiring detailed examination of actual costs of individual systems"66/ falls far short of meeting Congress' expectation and charge that rates be reasonable.

In developing models for representative systems across the nation, the key is the collection on a uniform basis of relevant cost and related data. The Coalition urges that the FCC require all cable systems to submit annual reports to the FCC containing the pertinent information, including

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64/ NPRM, p. 29.

65/ The failed experiment of the Federal Energy Regulatory Commission ("FERC") with benchmark returns on common equity illustrates the futility of attempting to set a single benchmark for an industry made up of component parts with unique characteristics. Just as the electric utility industry did not lend itself to a benchamark for even one element of cost of service (i.e., equity return), so the cable industry does not lend itself to a single benchmark rate for all elements of the cost of service.

66/ NOPR, p. 29.

operating income and expense data, rate base data, and the like, on a basis consistent with generally accepted accounting principles ("GAAP").67/ This data is absolutely essential for establishing meaningful benchmarks by class, as well as for use in proceedings in which either cable operators or franchising authorities seek to vary from the applicable benchmark on the basis of costs.

Undoubtedly some cable operators will resist providing such information, and they will rely on the old bromide of regulatory burden. Such claims should be taken with a grain of salt. First, such "the sky is falling" claims are as often grossly overstated as they are made; once the forms are established, it will not be a major effort for the affected cable systems to provide the data annually. Second, effective regulation cannot be accomplished without the relevant data, so the choice is not between effective regulation that is easy to administer and effective regulation that is not easy to administer; the choice is between effective regulation and ineffective regulation. The Coalition submits that the Cable Act commands effective regulation, i.e., regulation that results in reasonable rates, and that that goal cannot be achieved without the pertinent data. And as noted above, despite the cry of wolf

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67/ See NPRM, pp. 86-91 (Schedule A).

that is sure to emanate from the cable industry, the task is simply not that daunting.

e. Price Caps

The NPRM defines a price cap benchmark as "a formula set by the Commission to define reasonable increases in rates for the basic tier."68/ The Coalition suggests that the price cap approach has a role in the establishment of reasonable rates, though perhaps not in the manner envisioned by the FCC.

When a benchmark has been set for a specific class of cable systems, that should not be an open invitation for all cable operators with lower effective rates to raise their rates to the benchmark. Rather, while those cable operators with rates above the benchmark must lower their rates to the benchmark (subject to later increase if they make a cost showing that higher rates are reasonable), those cable systems with rates below the benchmark must not be permitted to increase their rates, absent a showing to the franchising authority of special circumstances. It is important to keep in mind that it is because existing rates of cable operators are unreasonable that the Cable Act was passed; thus it would patently contradict the legislative intent to establish a system that provides for automatic increases in already excessive existing rates. The threshold purpose of

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68/ NPRM, p. 29.

this exercise is to reduce existing rates to reasonable levels, not to add to the financial woes of subscribers by establishing a mechanism that allows operators to experience a greater windfall than under existing rates.

What the NPRM refers to as a price cap, the Coalition would refer to as a tracking mechanism, i.e., a method to permit automatic increases/decreases in rates to reflect certain key costs experienced by operators that are not likely to be offset by gains in productivity and the like. The Coalition is generally opposed to this concept, and suggests that there is a very heavy burden on any party seeking to institute such a tracking mechanism to prove that the cost in question is so unique that it is appropriate for tracking (versus the normal handling of costs in an overall cost-of-service context). The Coalition is unaware at this writing of any such cost items, and certainly would reject the notion that rates should be adjusted automatically to reflect such factors as inflation for the good and obvious reason that inflation (and other like) increases are often more than offset by cost savings in other areas.

4. Individual System Cost-Based Alternatives

a. Direct Costs of Signals Plus Nominal Contribution to Joint and Common Costs

Part and parcel of this alternative is that cable systems be required to keep their accounting records

according to GAAP,69/ a suggestion that Coalition strongly supports. The Coalition believes that such data should be filed annually with the FCC so that it has the best information possible in making its various determinations and so that the franchising authorities have access to this information when it is required.

The NPRM states that: "If we adopt a regulatory alternative that does not rely on cost-based regulation we may not adopt these proposed cost accounting requirements."70/ The Coalition feels very strongly that even if the FCC adopts the benchmarking approach as its basic regulatory tool under the Cable Act, it must collect this data. The alternative is ineffective regulation, which, as noted above, is worse than no regulation, even in a non-competitive industry like this one.

In response to the request for comments on the appropriate criteria for setting basic tier rate ceilings71/, the Coalition has not had sufficient time to review the relevant data that the FCC elicited through its separate data request contained in the December 23, 1992 Order herein. The Coalition believes that it is necessary to initiate a separate proceeding to resolve such an

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69/ See NPRM, pp. 86-91 (Schedule A).

70/ NPRM, p. 32, n. 84.

71/ NPRM, p. 33.

important issue once the data provided by the cable systems has been made available to the public and analyzed.

b. Cost of Service

The NPRM suggests that the application of traditional cost-of-service rate regulation would be inconsistent with "legislative intent."72/ Thus, as an alternative the NPRM proposes "to use simplified cost accounting requirements described in Appendix A if cost-of-service regulation becomes a component of our comprehensive model for regulating cable rates."73/

While the Coalition does not agree with the premise that rigorous cost-of-service regulation is inconsistent with legislative intent,74/ it does do believe that the data sought in Appendix A to the NPRM is an important step in the right direction whether or not cost-of-service regulation is adopted. As noted in previous comments, the Coalition strongly believes that such data will be necessary under the benchmark approach being proposed by the FCC as well as under the modified benchmark approach suggested by

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72/ NPRM, p. 33.

73/ Id.

74/ As stated in the House Report, "[t]he legislation requires the FCC to establish a cost-based formula for determining the maximum price cable operators will be permitted to charge for a required basic tier, ..." (p. 34.) See Cable Act, Section 623(b)(2)(C)(ii)-(vii), listing cost-of-service concepts that the FCC is "requir[ed]" to take into account.

Coalition since effective regulation of this industry requires timely, detailed cost and related data. Furthermore, we believe that this is precisely what Congress anticipated when it passed the Cable Act.

As a reason for not adopting cost-of-service regulation, the NPRM states that it gives "regulated companies little incentive to be efficient."75/ That statement is only accurate if one assumes that the cable operator's rates are kept keyed to cost of service on a minute by minute basis. The fact of the matter is that once rates are set on a cost-of-service basis, the regulated company has considerable incentive to effect cost savings, thereby increasing profits during the interim period while the rates are in effect. Given the physical limitations of franchising authorities, it must be assumed that once cost-based rates are set, they will remain in effect for some time, unless the cable company itself files for an increase. Thus the notion that cost-based rates deprive the regulated entity of cost-saving incentives is simply wrong, particularly, the Coalition suspects, in this industry.

The NPRM states that: "Our preferred approach would be for rates to be governed generally by a benchmark, with cable operators permitted to attempt to justify higher rate

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75/ NPRM, p. 33.

levels based on cost-of-service ratemaking principles."76/ Putting aside the Coalition's disagreement with the FCC over the viability of cost-of-service regulation, the point to be made is that benchmarking, to be effective, must have a cost basis and in order to achieve that result, the FCC needs to collect timely and detailed data. Furthermore, the cable company must not be the only party to be able to seek to use costs to justify a rate level different from the benchmark; the franchising authority must also have that right. The Coalition urges the FCC to keep in mind that the Cable Act was passed to protect subscribers from excessive rates, not cable companies from reasonable rates.

IV. JOINT CERTIFICATION AND JOINT REGULATORY JURISDICTION.

The FCC requests comments on a number of issues concerning joint certification and joint regulatory jurisdiction. The FCC observes that the legislative history appears to contemplate that two or more communities served by the same cable system could file a joint certification and exercise joint regulatory jurisdiction.77/ The FCC lists a variety of issues on which it seeks comments, including (1) whether it is conceivable that franchising

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76/ NPRM, p. 34.

77/ NPRM, p. 15.

authorities may not choose voluntarily to make such joint filings and (2) whether there are any incentives which the FCC could provide to encourage local franchising authorities regulating a single economic entity to coordinate their activities.

Throughout these comments, the Coalition has underscored the fact that franchising authorities have a variety of special needs and problems which must be recognized in the FCC's regulations. Thus, as a general proposition, the regulations as finally promulgated must not restrict or prohibit municipal or local governmental initiatives to minimize the costs of regulating cable rates. As the Commission and the legislative history correctly recognize, one way to accomplish this goal is to permit (but not require) joint regulation of a single cable operator. For example, the House Report states:

> The Committee does not intend for the subsection to be interpreted to prohibit two or more communities served by the same cable system from jointly filing a written certification to the Commission and from jointly exercising regulatory authority pursuant to such certification. The Committee recognizes that cable systems often serve several communities, none of which alone may desire to exercise rate regulatory authority, but which may wish to jointly exercise such regulatory authority.78/

78/ House Report, p. 80 (emphasis added).

Obviously, a cable operator which provides cable service over a large geographic area may find itself subject to regulation by a number of authorized local franchising authorities, ranging from county boards to town councils to statutorily mandated cable regulation boards. Under the joint regulation concept, two or more of these local franchising authorities could jointly regulate a cable operator. The advantages of permitting joint regulation in these circumstances are obvious. They include: (1) permitting these authorities to effectively regulate the rate for the basic service tier at a minimum cost; (2) minimizing duplication of effort; and (3) reducing the amount of paperwork which a cable operator must file.

The Commission recognizes that franchising authorities may not choose voluntarily to engage in joint regulation and thus seeks comments on whether it should provide incentives to encourage joint regulation. The Commission also requests comments concerning whether such coordination should be required as part of the certification process.

To begin, as the Commission implicitly recognizes, joint regulation is merely an option; a franchising authority which does not desire to engage in joint regulation should not be forced to do so nor should it be penalized for failing to do so. The advantages of joint regulation are obvious; no further "incentives" are

necessary to encourage joint regulation. The Commission should instead focus on making certification and joint regulation as easy as possible; stated differently, the Commission can best encourage joint regulation by making sure that its regulations do not erect roadblocks before those franchising authorities which choose to pursue the option.

It is neither necessary nor desirable for the Commission to require such coordination as part of the initial certification process. The initial certification process will begin almost immediately on promulgation of the final regulations. Local franchising authorities will, at that point in time, be concerned with reviewing and understanding the regulations as promulgated and with assuring that their own certification is properly filed. Asking these authorities to consider and commit to joint regulation at this early stage may result in the wholesale rejection of joint regulation as a viable and workable option because new franchising authorities simply have not had time to consider and pursue this option. The better course would be (1) to permit (but not require) local franchising authorities to file for joint certification initially and (2) to provide streamlined procedures for local franchising authorities which previously have been

individually certified to notify the Commission that they will operate jointly in the future.

The process for obtaining joint certification initially should be no different from the process of applying for individual certification. Two or more potential franchising authorities would file a written certification with the FCC in which each would state that (1) it will adopt and administer regulations consistent with the FCC's regulations with respect to basic service tier rates; (2) it has the authority to adopt and has the personnel (either individually or jointly with the other joint participants) to administer such regulations; and (3) the procedural laws and regulations applicable to joint rate regulation proceedings provide a reasonable opportunity for consideration of the views of interested parties.

An initial request for joint certification, like an individual request for certification, would become effective thirty days after the date on which it is filed. The Commission would base its initial certification on the application filed by the local franchising authorities; a cable operator or other interested party which desired to contest the joint certification would do so by petitioning the FCC to revoke the certification.

The Commission should also promulgate streamlined procedures permitting previously certified local franchising

authorities to file notice at any time that they will engage in joint regulation with other certified franchising authorities in the future.79/ The notification could be made by way of a simple FCC-approved form which lists (1) the names of the certified local franchising authorities which desire to engage in joint regulation and a statement that the authorities have the legal authority to engage in joint regulation with one another; (2) the name of the cable operator that will be subject to joint regulation; and (3) a statement as to whether that cable operator will remain subject to regulation by a local franchising authority which is not a joint participant (to the extent that such information is known). As with the initial individual certification, the joint certification should become effective thirty days after the date on which it is filed unless the FCC disapproves the certification. Any party objecting to the joint certification could do so by petitioning the FCC to revoke the certification.

The Commission also seeks comment on the impact of a franchising authority's decision to proceed to regulate a cable operator independently on the Act's requirement that an operator's rate structure be uniform throughout a

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79/ Conversely, the Commission should adopt streamlined procedures permitting joint authorities to "go their separate ways" in the future if one or more joint participants decides to exercise its own, independent jurisdiction.

geographic area.80/ If the Commission's intent is to suggest that joint regulation would be required within such an area, that suggestion is not supported by the legislative history, which stresses the optional nature of joint regulation. For example, the House Report states:

> H.R. 4850 is not intended to prohibit such joint regulatory authority, nor should it be interpreted to require such joint regulatory authority.81/

V. SMALL SYSTEM BURDENS.

The Cable Act requires the FCC to promulgate regulations designed to reduce the administrative and compliance cost burdens for cable systems that have 1,000 or fewer subscribers.82/ The Commission makes a number of observations concerning and seeks comment upon a number of issues associated with this statutory requirement. For example, the FCC states that it could (1) exempt cable systems that have 1,000 or fewer subscribers (hereinafter referred to as "small systems") from administrative burdens such as certain accounting requirements or the obligation to

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80/ NPRM, pp. 15, 56-57; Cable Act, Section 623(d).

81/ House Report, pp. 80-81.

82/ Cable Act, Section 623(i) ("In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burden and cost of compliance for cable systems that have 1,000 or fewer subscribers.")

submit certain data; (2) utilize abbreviated reports or alternatives to minimize administrative burdens; (3) exempt small systems from certain substantive or procedural rate regulation requirements; and (4) establish a presumption that small systems are unlikely to be earning returns or charging rates that could be effectively altered to the benefit of ratepayers through detailed regulatory oversight. The FCC also tentatively concludes that it should exempt small systems from certain procedural requirements concerning the filing of rate schedules. Finally, the FCC seeks comment upon whether it should distinguish between independently-owned, stand-alone small systems and small systems which are owned by a multiple system operator ("MSO").

At the outset, the Coalition reiterates a point made throughout these comments; the only thing worse than no regulation is ineffective regulation. Just because a system is small, and even given the Commission's statement that there is evidence that small systems tend to have higher costs and to charge lower rates,83/ there is no reason to exempt small systems from any regulation of the rate for their basic service tier. One of the major goals of the Cable Act is to ensure that subscribers pay reasonable

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83/ NPRM, p. 63.

rates84/ and that goal is just as important to subscribers of small systems as it is to subscribers of larger ones. The fact that a system is small may mean that certain administrative burdens should be eased; it does not, however, mean that regulation of the rate for the basic service tier should be dispensed with in its entirety.

There is no reason to assume that current or future rates of small systems are or will be reasonable for all small systems. Nor is there any compelling evidence which would support the establishment of a presumption that small systems are unlikely to be earning returns or charging rates that could be effectively altered to the benefit of ratepayers through effective regulatory oversight. In fact, the rates of small systems may be substantially overstated and may therefore require more scrutiny than larger systems.

The FCC does not know whether the rates of some small systems are reasonable, nor does it know whether small systems generally are earning a less-than-excessive return; hence, there is no reason to assume that small system rates are reasonable or that their returns are not excessive. And, there is absolutely no basis for concluding that rates of small systems cannot be altered to the benefit of ratepayers through proper regulation, particularly given that the FCC has not yet decided on the proper regulatory

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84/ See, e.g., Section 623(b)(1).

methodology for establishing the rate for the basic service tier, much less implemented that yet-to-be-determined method.

The Coalition submits that the most appropriate course to follow here is to permit local franchising authorities discretion to determine whether and to what extent to regulate small systems within the regulatory framework established by the FCC. The FCC regulations can direct local franchising authorities to reduce the administrative burdens on and costs of compliance to small cable systems without giving such systems carte blanche with respect to their rates.

Thus, because data is essential to effective regulation, small systems should be required to file annual reports which include operating income, expense, and rate base data. Without knowing precisely what data the FCC will require cable systems other than small systems to file, it is difficult to state with precision which data requirements could be eased for small systems. However, the Coalition believes that small systems may be required to file somewhat less detailed data on an annual basis, provided that a small system provides the franchising authority with all of the data necessary to determine if rates are reasonable.

Moreover, the FCC may permit small systems to file their annual reports at the same time that they file their

tax returns with the Internal Revenue Service and allow them to use the same information utilized to prepare annual tax returns. The annual reports and tax returns would be based on the same twelve months of data, which should considerably ease both the cost and the administrative burdens.

While the Cable Act does require the Commission to reduce the administrative burdens and costs of compliance on small systems, it does not state, either explicitly or implicitly, that small systems should be exempted from rate regulation of their basic service tier rates. This fact did not go unnoticed in the dissent to the House Report:

> [I]n its fervor to rein in all cable companies, the bill ignores certain special needs of small systems which have, on balance, served customers so well. Rather than exempt small systems from the economic and administrative burdens of rate [sic] and equipment, the bill merely directs the FCC to take into account the administrative burdens on small systems in adopting such regulations.85/

As discussed above, the Coalition strongly disagrees with the dissent; Congress has determined that the "special needs" of subscribers with respect to reasonable rates for the basic service tier outweigh the "special needs" of small systems in this same respect. While it may be true that many small systems have served the needs of their customers well, it is equally true that others have not.

85/ House Report, Dissent, p. 187 (emphasis supplied).

Congressional intent to protect cable subscribers from unreasonable rates for the basic service tier cannot be swept aside by generic statements that some systems have acted honorably.

Here, as in other portions of the NPRM, the Commission takes a curious "heads cable operators win, tails subscribers lose" stance. The Commission states that it might devise basic cable regulations that assure that high-cost, small systems will be able to fully recover their reasonable costs. As stated elsewhere in these comments, the Coalition does not oppose this conclusion provided that franchising authorities have the ability to reduce overstated and unreasonable rates to reasonable levels for small systems.86/

Exclusion of small systems from scrutiny of their basic service tier rates by local franchising authorities is directly contrary to one of the major goals of the Cable Act. There is no valid reason to exempt small systems from substantive or procedural rate regulations which are necessary to ensure that basic service tier rates are reasonable. The Coalition therefore recommends that the basic framework for regulation of the basic service tier rate of small systems should be the same as described elsewhere in the Coalition's comments.

86/ NPRM, p. 63.

Franchising authorities should be permitted, in their reasonable discretion, to relax substantive and procedural rate regulations otherwise applicable to small systems to lessen administrative and cost burdens while still providing the franchising authority with the ability to establish reasonable rates. For example, franchising authorities could be permitted to require small systems to certify their compliance with the FCC's rate regulations on at least an annual basis, with at least sixty days prior notice of a proposed increase in rates. Franchising authorities could either accept, reject, or suspend these filings. If a franchising authority accepts the filing, no further procedures would be necessary. If a franchising authority suspends the filing, the FCC's rate regulations would "kick in" and the franchising authority would conduct a full rate review, and would have the power to reduce rates and to order refunds.

Finally, the Coalition firmly believes that any small system exceptions or exemptions should apply only to independently-owned, stand-alone systems. To extend the exemption to an allegedly small system that is in fact owned by an MSO would simply turn the Cable Act on its head. The purpose behind any sort of small system exemption or exception is to reduce administrative and cost burdens on those operators which are arguably too small to comply with

all of the Act's provisions due to budgetary, personnel, and other similar limitations. An MSO which owns a small system faces none of these constraints and should be required fully to comply with both the Act and the Commission's regulations.

CONCLUSION

WHEREFORE, the Coalition requests that the Commission revise its NPRM as discussed in these initial Comments.

Respectfully submitted,

THE COALITION OF MUNICIPAL AND
OTHER LOCAL GOVERNMENTAL
FRANCHISING AUTHORITIES

By William T. Miller

William T. Miller
Jonathan S. Liebowitz
John Michael Adragna
Thomas C. Gorak
Royce L. Dickens
Kathryn A. O'Brien

Miller, Balis & O'Neil, P.C.
Suite 1400
1101 Fourteenth Street, N.W.
Washington, D.C. 20005
(202) 789-1450

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APPENDIX TO
THE
COMMENTS OF THE COALITION OF MUNICIPAL AND OTHER
LOCAL GOVERNMENTAL FRANCHISING AUTHORITIES
TO NOTICE OF PROPOSED RULEMAKING